ASHRAF JOOSAB
and
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND BERE JJ
HARARE 18 NOVEMBER 2014 AND 23 AUGUST 2017

Criminal Appeal

Mr D Drury for appellant
Mr I Muchini for respondent

BERE J: The appellant was convicted by a regional magistrate sitting at Harare Magistrate Court on two counts of fraud and one count of Theft by Conversion. Upon his conviction, the appellant was sentenced as follows:

> "Count 2 - six years imprisonment
> Count 3 - three years imprisonment
> Count 5 - three years imprisonment.
>
> Of the total 12 years imprisonment 2 years is suspended for 5 years on condition the accused does not during this period commit any offence involving dishonesty, for which he is sentenced to imprisonment without the option of a fine. 4 years imprisonment is suspended on condition accused makes restitution in the sum of $133 000 to complainant Mussa on or by 31 October 2012. Of the remaining 6 years, 3 years imprisonment is suspended on condition accused makes restitution in the sum of $29000 to the complainant Kilpin through the clerk of court, Harare on or before 31 October 2012."

The appellant has now appealed against both conviction and sentence.

In his notice of appeal against conviction the appellant's contention is as follows:

A 1) that in respect of count 2 no misrepresentation was made and therefore no crime was committed.

2) that there was no intention to deceive

3) that there was evidence that the appellant had been paying interest and that this is not consistent with the State's allegations.

4) that the complainant had described the nature of the transaction between himself and the appellant in the acknowledgement of debt as a loan.

B. As regards count number 3 it was contended that the learned magistrate had misdirected himself in finding the appellant guilty in circumstances where it was clear that there was a breach of a civil business agreement and there was nothing criminal about it.

C. In respect of count 5 the contention was that the learned magistrate erred and misdirected himself by failing to appreciate that when the complainant in this count gave the motor vehicle to the appellant, he had given the impression that the vehicle was now his and he could do as he pleased with the vehicle.

The respondent opposed this appeal in its entirety.

The thrust of the submissions made by the counsel for the appellant was to try and demonstrate that the evidence which was placed before the court in respect of all the three counts failed to reach the accepted threshold required in criminal prosecution mainly in that the trial court adopted a "boxing match" approach where the appellant was pitted against the individual complainants, with the trial magistrate assuming the role of a referee.

I do not believe that the characterization ascribed to the court *a quo* is correct if regard is had to the court *a quo*'s judgment juxtaposed with the evidence led in court.

In advancing appellant's in respect of count 2 case, counsel for the appellant sought to rely on the case of *S* v *Vambe*[1] by arguing that the circumstances of this count point to a prepaid contract and that no offence was committed.

A proper reading of the court *a quo's* judgment shows that the learned magistrate was fully aware of the concept of prepaid contracts and that even the *Vambe* case noted that in a proper case, as long as the state is able to prove a fraudulent misrepresentation as having induced the complainant to part with his money, then the accused can still be found guilty of either fraud or theft by false pretences. In this regard in *S* v *Vambe* the court remarked as follows:

"It must be noted that this case is concerned specifically with theft by conversion. It appears to be settled law that where one is dealing with what Hunt calls "prepaid contracts" a charge of theft by conversion will usually fail. Of course, if the state can prove a fraudulent misrepresentation to the accused's state of mind which induced the complainant to part with his

[1]. 1986 (1) ZLR 168 (S)

money, then the accused might be guilty of fraud or theft by false pretences. See Smith's African Criminal Law and Procedure especially p637-8; S v John 1971 (2) PHHH 125; *R* v *Harlen* 1964 (4) SA 44 (SR); *R* v *Takumira* 1958 *R* and *N* 187. Similarly, if the state can prove that the money was "trust money", that is money given to an agent with instructions to devote it to a specific propose, then the use of that money for some other purpose, without the retention of an equivalent liquid fund may well constitute theft."[2]

In count 2 the court *a quo,* for very sound reasoning accepted the evidence of Abdul Mussa that when the witness parted with his $150000, the appellant had made a misrepresentation or lied to him concerning the specific use of that money. The appellant himself confirmed the lies. There was overwhelming evidence that indeed the complainant had parted with his money on the strength of such misrepresentation. The appellant's sole motive was to deceive and indeed the complainant was deceived. In my view all the elements of fraud were satisfied and the conviction cannot be questioned.

In count 3 the appellant misrepresented to David Kilpin that he had a Toyota landcruiser for sale. The appellant knew he had no such vehicle for sale. The complainant parted with his money after having been induced to do so by the appellant. The appellant did not deliver the vehicle. The trial magistrate summed it as follows:

> "In fact, he (accused) had no such vehicle. This is so regard being had to the fact that he even stole a customer's vehicle and sold it to the complainant David Kilpin. Thus he robed Peter to pay Paul, so to speak."[3]

In count 5 the appellant was given the third complainant, Norman Mataruka's motor vehicle with specific instructions to sell same and fully account to the complainant. The court reasoned out that Mataruka had instructed the appellant as a car dealer to sell the vehicle on his behalf and that the complainant had specifically instructed that he would himself sign the agreement of sale. Contrary to the specific instructions given to the appellant, the appellant then decided to give the vehicle to David Kilpin. David Kilpin confirmed this arrangement.

In my view, it is not possible to challenge a conviction for theft by conversion under such circumstances.

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[2]. 1986 (10 ZLR 168 (SC) at p 172 E-G.

[3] . Record p. 12

All in all the appeal against conviction has no merit at all, and it is accordingly dismissed.

This leaves us to deal with the appeal against sentence.

The sentence imposed by the court a quo came under heavy criticism on the grounds that the term of imprisonment imposed induced a sense of shock and that it was out of line with sentences imposed in similar cases.

When this appeal was argued, we had the opportunity to see the appellant who appeared quite frail and tormented by poor health. We were also favoured with a medical report for the appellant from Dr J Pedzisayi which highlighted the appellant's serious medical challenges centred on Hypertension and Diabetes and concluded by saying:

> "The combination of Hypertension, Diabetes, age and weight tent to raise one's risk of sudden cardiovascular event like Mycardial Infarction (heart attack)".

At the same time we were also furnished with a letter written to the national Prosecuting Authority by Messrs Venturas and Samukange Legal Practitioners advising that the appellant had effected full restitution in respect of the amount of money involved in count 2.

In addition, we were favoured with a copy of letter, again addressed to the National Prosecuting Authority written by Mr David Kilpin's legal practitioners, Messrs Dhlakana B Attorneys advising that the complainant in count 3 had received full restitution. The National Prosecuting Authority's representative Mr *Muchini* confirmed such development.

These very strong mitigatory factors were not present when the court *a quo* considered the appellant's sentence. In the light of these developments the appeal court remains at large on the question of sentence.

In the light of these new developments highlighted in favour of the appellant we propose to reconfigure the sentence imposed by the court *a quo* by increasing the 2 years suspended on account of good conduct to 5 years so that the new sentence reads:

> "Of the total of 12 years imprisonment, 5 years imprisonment is suspended for 5 years on condition the accused does not during that period commit any offence involving dishonesty for which he is sentenced to a term of imprisonment without the option of a fine."

The rest of the sentence remain as framed by the court *a quo*. To this extent the appeal against sentence succeeds.

Hungwe J agrees……..

Honey and Blanckebnberg, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners